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July 5, 2011

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RE: Audit 2011-101, Los Angeles County Department of Children and Family Services
Response to Meet and Confer Letter of June 29, 2011 Regarding Administrative Subpoenas

Dear Mr. Barer:

We were very disappointed to receive your letter of June 29, 2011, as its mischaracterization of our efforts to work with you regarding this matter suggests that our efforts simply may have been for naught, and that you are determined to refuse us access to the information no matter what the law requires or how hard we work to assure you we are entitled to the information and we will protect its confidentiality as required by law. However, in yet another effort to move this matter forward, I am writing this response to set the record straight regarding our past efforts, reassert our position regarding our right to obtain the information we are seeking through the subpoenas, and advise you of our next steps regarding this matter if you maintain your stubborn refusal to comply with the subpoenas.

To set the record straight, we already have gone to substantial lengths to work with you and your client to secure release of the information we have been seeking, but we have encountered only stalling tactics and an unyielding refusal to provide the information to which we are entitled. As you likely are aware, the Bureau of State Audits (bureau) commenced Audit Number 2011-101 on March 15, 2011, by sending the County of Los Angeles (county) a job start letter explaining the audit and the State Auditor's unfettered right of access to county records and employees. On May 11, 2011, bureau Senior Staff Counsel Scott Baxter spoke with Los Angeles Deputy County Counsel Katie Bowser and reiterated this right of access. The following day, Mr. Baxter, audit Team Leader Ben Belnap, and I spoke with Ms. Bowser, Deputy County Counsel Tom Fagen, and County Counsel Andrea Ordin to again reiterate the bureau's right of access. On May 16, 2011, bureau staff visited the county for an audit entrance conference, wherein we again informed the county about our audit process, discussed the audit objectives, and explained our statutory authority to obtain and examine any and all records to which the county has access, including confidential documents such as documents that may be considered privileged. Subsequent to the entrance conference, on May 17, 2011, bureau staff requested numerous documents from the county, including the death reports that are the subject of the administrative subpoenas the State Auditor issued on June 21, 2011.

Over the course of the past six weeks, bureau auditors, staff attorneys, and I have been in weekly, and sometimes daily communication with county officers and employees, in a good faith attempt to explain our right of access, the purpose of our request for the death reviews, the statutory provisions that prevent the bureau from revealing the county's confidential information, and the extraordinary efforts we undertake to protect the confidentiality of records we obtain from public (and sometimes private) entities up and down the State of California. Specifically, this office sent electronic and written correspondence to your client

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relating to the production of the information we are seeking on May 19, 2011. We also conferred telephonically with your client on June 7, 8, 10, and 23, 2011. Further, in response to your client's suggestion that a face-to-face meeting would be beneficial, I sent my Associate Chief Counsel to Los Angeles to meet with you, Executive Officer Sachi Hamai, and attorney Amy Naamani on June 27, 2011. Then on June 28, 2011, we had yet another telephonic meeting with you, Sachi Hamai, and Amy Naamani. In sum, the bureau has engaged in ongoing, good faith discussions and made every reasonable effort to inform you and your client that, pursuant to the plain language of Government Code Section 8545.2, the State Auditor is authorized by law to examine the records in question, to the same extent that the staff of the County Counsel's Office who wrote those documents have access, and that your client's failure to permit access constitutes a crime.

Contrary to the assertions in your June 29 letter, we have informed you and your client repeatedly that the bureau is willing to discuss and work with your client to ensure that the bureau does not reveal any of the county's confidential information. In fact, as you have been informed on several occasions, the county will have an opportunity to review the draft audit report to ensure that no privileged information is included in the report, and that no information disclosed in the report constitutes a waiver of the right to withhold privileged information from public disclosure. The county also will have an opportunity to review the bureau's responses to Public Records Act requests concerning the audit to ensure that no privileged information is released in response to a request, and that no waiver of the right to withhold privileged information from public disclosure occurs through that process. Moreover, in the course of our ongoing discussions, we have advised repeatedly that, just as it is a misdemeanor for county employees to refuse the bureau access to confidential information, it is a misdemeanor for any bureau employee to release it.

Also contrary to your assertions, in the meeting that you had with Associate Chief Counsel Donna Neville on June 27, 2011, she spoke with you regarding the bureau's policy of not inserting itself into pending litigation by taking a position as to the legitimacy of any one party's contentions in the course of litigation. She did this as an offer of assurance that in the event the county is involved in litigation that may relate to a privileged document, the bureau has no interest in making use of that document to comment in any way regarding how the litigation should be resolved. You grossly mischaracterized her comments as indicating the bureau has no history of receiving privileged documents. That certainly is not what she said and could not be further from the truth. The bureau routinely obtains from state and local agencies confidential documents containing privileged information relating to healthcare, finances, personnel matters, deliberations, local government legislative processes, physician-patient communications, attorney-client communications, and attorney work-product. We have been receiving such documents throughout the bureau's nearly 20-year history, and it is an essential part of how the bureau performs its work. No bureau policy prohibits the bureau from obtaining the documents we are seeking through our subpoenas; only that we not use the documents as a basis for commenting on any litigation the documents may affect.

In spite of the plain language of the law and the bureau's best efforts to engage in a productive and successful dialogue about how best to effectuate the production of the documents we are seeking, your client has engaged in unnecessary delay and raised spurious legal arguments to avoid disclosing the documents. Attorneys in the County Counsel's Office initially asserted that while they represented the Department of Children and Family Services, they did not represent the Children's Special Investigation Unit (CSIU), which had separate counsel, so we would have to deal with that counsel directly to obtain

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CSIU documents. In response to that assertion, we attempted several times to contact CSIU's attorney, but she did not return our telephone calls. Meanwhile, attorneys in the County Counsel's Office agreed to provide us with certain documents. We later were told by attorneys in the County Counsel's Office that they in fact represent the county as a whole, and that we must talk with them about obtaining CSIU documents. So when we then requested CSIU documents from the County Counsel's Office, that office refused to provide the documents they originally had agreed to provide to us because now we were requesting additional documents.

As just described, your client has been less than forthcoming throughout the process of our attempting to facilitate the mandatory disclosure. In addition, you have yourself engaged in confusing tactics, contending that your client cannot provide us with the death reports for fear that doing so will render them no longer privileged and then offering perhaps to provide us with a single death report. Worse, in your June 29 letter you have engaged in mischaracterization of our efforts to work with you to reach a resolution of this matter and sent copies of your letter to several Members of the Legislature. Such conduct obviously undermines any good faith meet and confer process.

Consistent with the provisions of the Generally Accepted Government Auditing Standards, the bureau is statutorily required to remain independent from external impairments and controls in conducting its work. The reason for this independence is twofold. First, so that the Legislature and the public can be assured that the audits we undertake are above reproach, providing honest, objective, and thorough analyses of issues of statewide importance. Second, because, pursuant to federal law, federal funding received by the State, including funding that benefits the county, must be subject to audit by an independent auditor. Your assertion that the subject of a bureau audit is entitled to control or influence the information the bureau reviews in conducting its work would, if true, eviscerate the bureau's independence and potentially jeopardize billions of dollars in federal funding—an absurd result given the plain language of the law. Further, while the privilege to withhold confidential attorney-client communications is fundamental to American jurisprudence, the Legislature's authority to investigate questionable practices that jeopardize the health, safety, and welfare of the state's most vulnerable children is fundamental to American governance.

As a result of the county's dilatory tactics, if the county refuses to comply with our subpoenas and produce the documents we are seeking by close of business on July 7, 2011, the bureau will be unable to include an analysis of the county's program in the audit report scheduled for release in early October. Accordingly, the State Auditor will withdraw the three subpoenas. Instead, the State Auditor will undertake a separate audit of the county's child protective services, scheduled to commence in late summer. This audit will result in a stand-alone report focused solely on the county's operations, including, but not limited to, the departmental takeover by the members of the Board of Supervisors. We anticipate resuming our work in the county in late summer, and will issue a new subpoena for the documents in question at that time. We also are likely to seek by subpoena additional documents, as an audit team focusing its attention solely on one county's child protective services program will have an ability to conduct a more thorough audit and to address a broader array of issues in a stand-alone report. With that in mind, we ask that you please instruct your client to refrain from destroying or altering any records relating to child death inquiries, whether or not your client deems them confidential. In addition, please provide me with the name and location of the appropriate agent(s) for service of process.

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Finally, so as to avoid additional protracted discussions after your client is served with the new subpoena(s), I remind you that the first rule of statutory construction is to begin by examining the plain language of the statute in question, and if there is no ambiguity in the language of the statute, to apply the statute as written. Consideration of other sources of interpretation is prohibited where, as here, the meaning of the statute is plain on its face. While the Evidence Code provides several statutory privileges to withhold the production of certain documents, those privileges are predominantly designed to protect *confidential communications* of various types and arising out of various relationships. No provision of the Evidence Code expressly precludes the State Auditor from having access to privileged information. In the absence of such express preclusion, as provided by Government Code section 8545.2, the State Auditor has a right to access information even though it may be covered by a privilege set forth in the Evidence Code. Accordingly, Section 8545.2, gives the State Auditor the legal authority to enter county offices during regular business hours to access, examine, and reproduce "any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property, of any agency of the state, whether created by the California Constitution or otherwise, any local government agency, including any city, county, and school or special district, for any audit or investigation." That access, as set forth in subdivision (b) of Section 8545.2, is the same right of access that the county's employees or officers have, and failure to permit that access is a crime. In our view, to the extent that county counsel, CSIU counsel, any county officer or employee, including any member of the board of supervisors, has access to the death reviews we are seeking, the plain language of the law authorizes this office to access the confidential documents, irrespective of any statutory privilege that may or may not apply. Because the plain language of the statute is so clear and unambiguous, we think a court would err if it ignored the statute's plain language and relied instead on extrinsic sources. We further think that, if the documents in question are, in fact, privileged, case law provides that "when privileged documents have been disclosed . . . in response to the request of a government agency . . . no waiver of privilege will occur if the holder has taken reasonable steps under the circumstances to prevent disclosure." (*The Regents of the University of California v. Superior Court* (2008) 165 Cal.App.4th, 672, 683.)

It truly is unfortunate that you have brought us to such a position of impasse due to the unwillingness of you and your client to work with us to resolve this matter in a manner that is consistent with the law and furthers the objectives of transparency and accountability in government. But make no mistake, we will not relent in accomplishing our mission of performing the audit that we were directed to perform by the Legislature.

Sincerely,



SHARON REILLY
Chief Legal Counsel